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No. 71-963

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

BBF LIQUIDATING, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-19) is reported at 450 F.2d 938. The district court did not render a written opinion.

JURISDICTION

The court of appeals entered its judgment on October 14, 1971 (Pet. 19), and denied a petition for rehearing and suggestion for rehearing *en banc* on November 29, 1971 (Pet. App. A 20). On December 22, 1971, Mr. Justice Douglas extended the time for filing

a petition for a writ of certiorari to January 28, 1972; the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a California corporation, which was dissolved prior to being indicted for violating Section 1 of the Sherman Act, is an "existing" corporation within the meaning of Section 8 of the Sherman Act and therefore still liable to prosecution for acts committed before dissolution.

STATUTES INVOLVED

Section 8 of the Sherman Act, 15 U.S.C. 7, provides:

> The word "person" * * * shall be deemed to include corporations * * * existing under * * * the laws of any State * * *.

Sections 5400 and 5401 of the California Corporations Code, and Sections 22-24 of the California Code of Civil Procedure, are set forth at App., *infra*, pp. 11-12.

STATEMENT

Petitioner, BBF Liquidating, Inc. ("BBF"), is a California corporation. Under the name Bell Brand Foods, Ltd., BBF formerly engaged in the production and sale of snack foods. On November 8, 1968, Sunshine Biscuits, Inc., agreed to acquire substantially all the assets of Bell Brand Foods. Bell Brand Foods ceased doing business on November 26, 1968, changed its name to BBF Liquidating, Inc., on December 16, and filed a Certificate of Winding Up and Dissolution on January 24, 1969. All of the assets that BBF re-

ceived from Sunshine in exchange for its own assets, and all of the assets that were not exchanged, were distributed to, or for the benefit of, BBF's shareholders on or prior to January 24, 1969 (R. 9-10).[1]

On May 26, 1970, an indictment was returned charging BBF Liquidating, and others, with conspiring to fix the prices of snack foods in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. BBF's dissolution occurred before the grand jury's investigation into the alleged price fixing, and BBF did not undergo dissolution with the intention of avoiding criminal liabilty.

BBF moved to dismiss the indictment on the ground that since it had been dissolved prior to indictment, it was not liable to criminal prosecution (R. 7).[2] The district court granted this motion (R. 53) without rendering a written opinion, and the government appealed.

The court of appeals reversed, *per curiam*, holding that "a dissolved California corporation has the same vitality for all criminal prosecutions as it does for civil actions," and is therefore amenable to a Sherman Act prosecution based on acts committed prior to its dissolution (Pet. App. A 19). Accordingly, the court of appeals directed the district court to reinstate the indictment (*id.*).

ARGUMENT

1. Petitioner alleges a conflict between the court of appeals in this case and the court of appeals in *United*

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[1] "R." refers to the record in the case in the court of appeals.

[2] The other defendants, Frito-Lay, Inc., Granny Goose Foods, Inc., and Pet, Inc., later pleaded *nolo contendere* and were fined $35,000 each.

States v. *Safeway Stores, Inc.*, 140 F.2d 834 (C.A. 10). The differences between those courts relate only to interpretation of California law for the purpose of determining whether a Sherman Act prosecution should be abated. In our view the decision below is correct and there is no conflict warranting review by this Court. Subsequent decisions have undermined the rationale and approach of *Safeway Stores* so that today it appears that not even the Tenth Circuit would follow that decision.

Section 8 of the Sherman Act, 15 U.S.C. 7, provides that a "person" liable to prosecution under the Sherman Act includes a corporation "existing under * * * the laws of any State * * *." Accordingly, whether BBF, as a corporation dissolved prior to indictment, still "exists" for purposes of a Sherman Act prosecution, depends upon state law. *Melrose Distillers, Inc.* v. *United States*, 359 U.S. 271, 272.

BBF is a California corporation. California law provides that a dissolved corporation continues in existence for the purpose of collecting and discharging obligations, and for prosecuting and defending "actions" by or against it. Cal. Corp. Code § 5490. In California, an "action" is "an ordinary proceeding in a court of justice by which one party prosecutes another for * * * the punishment of a public offense"; there are two types of "actions"—civil and criminal. Cal. Code Civ. Pro. §§ 22, 24. Thus, a dissolved California corporation, under California law, continues to "exist" for the purpose of defending criminal "actions" and Section 8 of the Sherman Act renders such corporations subject to prosecution under that Act.

Aside from the instant case, the only decisions dealing with the question whether "action" as used in Section 5400 of the California Corporations Code includes criminal actions are *Safeway Stores*, *supra*, and *United States* v. *San Diego Grocers Ass'n, Inc.*, 177 F. Supp. 352 (S.D. Cal.). In *Safeway Stores*, the Tenth Circuit held that "action" did not include a criminal prosecution, but the court apparently overlooked Section 24 of the California Code of Civil Procedure, which defines "action" to include both civil and criminal proceedings. In *San Diego Grocers*, however, the court examined Section 5400 of the Corporations Code and Section 22 and 24 of the Code of Civil Procedure, and concluded that "the statutes of the state of California clearly established that the word 'action' is used to include criminal as well as civil prosecutions." 177 F. Supp. at 354.

San Diego Grocers thus represents a more thorough analysis of the question in light of the statutes of California. For this reason the Court of Appeals for the Ninth Circuit in this case followed *San Diego Grocers* rather than *Safeway Stores* in concluding that a "dissolved California corporation has the same vitality for all criminal prosecutions as it does for civil actions" (Pet. App. A 19). The Ninth Circuit, of course, has a special familiarity with California law and its decision is correct.[3]

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[3] Although the United States believes that this Sherman Act prosecution could be maintained even if dissolved California corporations were continued in existence solely for civil actions, but not for criminal actions, the court below never reached this issue. Thus, contrary to petitioner's assertion, this issue is not presented by this case (see Pet. 7-8, 11-14).

Moreover, there is substantial doubt about the continuing validity of *Safeway Stores* even in the Tenth Circuit and it appears that only the occasion is needed to pronounce its complete demise.[1] That court's subsequent decision in *United States* v. *United States Vanadium Corp.*, 230 F.2d 646, 649-650 (C.A. 10), involved a New York statute containing provisions nearly identical to the California ones the court had overlooked in *Safeway Stores*. In *Vanadium* the court held that "action" embraced both civil and criminal proceedings and that a dissolved corporation was therefore subject to criminal prosecution.

2. Contrary to petitioner's assertion (Pet. 8), this case does not involve an important question of federal law. *Melrose Distillers, Inc.* v. *United States*, 359 U.S. 271, settled the law in this area. That case involved

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[1] Other courts have consistently refused to follow the narrow approach of *Safeway Stores*. See *United States* v. *Carter*, 311 F.2d 934 (C.A. 6) (Taft-Hartley Act); *United States* v. *P. F. Collier & Son Corp.*, 208 F.2d 936 (C.A. 7) (Fair Labor Standards Act); *United States* v. *Globe Chemical Co.*, 311 F. Supp. 535 (S.D. Ohio); *United States* v. *Arcos Corp.*, 234 F. Supp. 355 (N.D. Ohio); *United States* v. *Anaconda American Brass Co.*, 210 F. Supp. 873 (D. Conn.); *United States* v. *Cigarette Merchandisers Ass'n, Inc.*, 136 F. Supp. 214 (S.D.N.Y.).

Furthermore, in *Melrose Distillers, Inc.* v. *United States*, 359 U.S. 271, decided after *Safeway Stores*, this Court granted certiorari to resolve a conflict among the circuits over Delaware's dissolution statute. The Court cited (359 U.S. at 272 n. 1), as illustrative of the conflict, *United States* v. *Line Material Co.*, 202 F.2d 929 (C.A. 6), which relied heavily on *Safeway Stores* for a narrow construction of Delaware law. *Melrose* rejected this view of state dissolution statutes in Sherman Act cases, see 359 U.S. at 273-274. *Melrose* thus implicitly, if not explicitly, rejected the narrow reading of state law exemplified by *Safeway Stores*.

two corporations dissolved under the laws of Delaware and Maryland, respectively, after they had been indicted for violating the Sherman Act. The Court examined the statutes of the two states and held that in each case state law implied "enough vitality to make the corporation an 'existing' enterprise for the purposes of § 8 of the Sherman Act." 359 U.S. at 273. Similarly, the court below held that BBF, as a dissolved California corporation, has the "vitality" to make it amenable to this Sherman Act prosecution (Pet. App. A 19).

Petitioner suggests that this case differs from *Melrose* because BBF's dissolution occurred prior to indictment, and in good faith, while in *Melrose* the dissolutions occurred after indictment, with the corporate assets remaining under the same ultimate ownership (see Pet. 8-10). *Melrose*, however, in no way indicates that the result depends upon the timing of the dissolution. California law likewise does not indicate that good faith dissolution is to be treated any differently than dissolution undertaken to avoid liability. The California statute continues the corporate existence for certain purposes, without regard to the motive for dissolution.[5]

Sound considerations of policy counsel that the deterrent effect of criminal law not vary with the timing of dissolution. Whatever form the dissolution takes—whether rearrangement of corporate structure after

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[5] Petitioner has not cited, nor have we found, any case in which the good faith nature of the dissolution barred a Sherman Act prosecution. Compare *United States* v. *Arcos Corp.*, 234 F. Supp. 355, 358 (N.D. Ohio).

indictment, as in *Melrose*, or before indictment, as in *San Diego Grocers*, or even transfer of assets before the grand jury investigation—the fact remains that the corporation has been charged with wrongdoing committed while it carried on its operations. No matter what has happened to the assets after the criminal violation, the corporation and its shareholders have already benefited from the corporate illegality. So long as the corporation retains an existence to pay its debts, as dissolved California corporations do under Section 5400 of the Corporations Code, there is no reason to bar the payment of a criminal fine. As the Court noted in *Melrose*, "a corporation cannot be sent to jail. The discharge of its liabilities whether criminal or civil can be effected only by the payment of money." 359 U.S. at 274.[6] If BBF committed the offenses charged while it was still doing business, its shareholders should not retain the fruits of the illegalities simply because the corporation dissolved before the government commenced prosecution.

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[6] BBF itself recognizes that it can be held liable for any civil damages it may have caused as a result of its alleged price-fixing activities; in excess of twenty-five such private treble-damage actions have already been filed (Br. for Appellee in the Court of Appeals, p. 20).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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